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Supreme Court, U.S.
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No. 98-1546

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

JOHN COYNE,
Petitioner,

v.

GARY MOHR,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In affirming the denial of habeas relief, did the court of appeals properly apply this Court's well-established harmless error test?

2. Where the district court that denied the petitioner's various habeas claims in this pre-AEDPA case found that only one of those claims was even debatable among reasonable jurists, and the court of appeals' opinion refers only to that claim and not to the other clearly non-meritorious ones, is certiorari warranted?

STATEMENT OF THE CASE

We agree with Petitioner's statement of the case. As he recounts in detail, he was tried and convicted of two counts of felonious assault, and those convictions were affirmed on direct appeal. His efforts to overturn the convictions through Ohio's post-conviction relief procedures proved unsuccessful, and now a U.S. magistrate judge, U.S. district judge and the Sixth Circuit have found no merit to his federal habeas claims.

REASONS FOR DENYING THE WRIT

A. The Sixth Circuit Adhered To Well-Settled Law When It Rejected Petitioner's Claim of Prosecutorial Misconduct, And There Is No Lower Court Split of Authority On The Question.

As the Court has made clear, "a federal court may grant habeas relief based on trial error only when that error 'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Calderon v. Coleman*, 119 S. Ct. 500, 503 (1998) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). "[M]ere speculation" that such error occurred is insufficient. *Calderon*, 119 S. Ct. at 503. Rather, "the court must find that the defendant was actually prejudiced by the error." *Id.*

Here, the Sixth Circuit, in an unpublished opinion, reviewed a claim of trial-type error – an allegation of prosecutorial misconduct – and asked "whether the conduct was so egregious so as to render the entire trial fundamentally unfair." Pet. App. at 3 (quoting *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir.), *cert. denied*, 118 S. Ct. 572 (1997)) (internal quotations omitted). Applying that standard to the facts of this case, the Sixth Circuit found that "the prosecutor's closing statements were not, as a matter of law, so prejudicial as to deny Coyne a fair trial." Pet. App. at 3.

That test is fully consistent with *Brecht* and its progeny, which describe trial-type error as "amenable to harmless-error analysis [in federal habeas cases] because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial." *Brecht*, 507 U.S. at 629 (quotations omitted). The Sixth Circuit made that assessment, as did the magistrate and district judges, and there is no important issue in the application of that undisputed test to the particular facts of this case that now warrants this Court's review, particularly where all of the judges below at both the circuit and district court levels reached the same conclusion: that the alleged prosecutorial misconduct was harmless.

And on his first question regarding the Sixth Circuit's analysis of that alleged misconduct, Petitioner conspicuously fails to allege any split of authority among the lower federal courts, and he cannot, for none exists. Rather, he simply argues that the Sixth Circuit misapplied this Court's harmless error test for reviewing trial-type errors in federal habeas cases. That claim does not present any ongoing legal problem demanding the Court's review, for not only is the law well-settled on the question, but the Sixth Circuit's test as applied in this case is consistent with both the test laid down by this Court and the similar standards followed by other lower federal courts. There is no conflict here, nor any issue warranting this Court's review.

B. The Sixth Circuit's Focus In Its Opinion On Only Two of Petitioner's Seven Habeas Claims Does Not Support Issuance of a Writ of Certiorari.

Petitioner seeks certiorari on his second question solely because the Sixth Circuit's opinion below speaks only to the one issue that was "subject to reasonable debate"

according to the magistrate judge who first looked at the case. Pet. App. at 67. In other words, he cries foul because the court of appeals' opinion does not refer to his other arguments – arguments that, according to the magistrate judge, were without merit and did not even meet the standards described in *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (requiring an unsuccessful habeas petitioner seeking appellate review of his claims to show that those claims are at least "debatable among jurists of reason" or could be resolved differently by a higher court).

No rules or cases require federal appellate courts, when reviewing pre-AEDPA habeas appeals under the former certificate of probable cause regime, to refer in their opinions to every frivolous argument that the habeas petitioner has raised. Yet that is the relief Petitioner seeks.

In the decision below, the Sixth Circuit focused on the one claim that the magistrate judge and district judge thought debatable, and then agreed with them that even it lacked merit upon closer examination. Petitioner's argument, if successful, would simply impose on the courts of appeals an obligation to add a tag line at the end of their opinions to the effect that "all of petitioner's remaining arguments are frivolous as the district court found." No such requirement exists, nor should it. Federal habeas is of course designed "to correct wrongs of a constitutional dimension," *Wainwright v. Goode*, 464 U.S. 78, 83 (1983), not the kind of not-even-debatable claims raised by Petitioner in addition to his prosecutorial misconduct claim.

Petitioner made his best arguments to the Sixth Circuit. That that court chose only to hone in on the strongest of his arguments in its opinion does not detract from the fact that he had a full and fair opportunity to present all of his claims – including the frivolous ones – in both the district

and circuit courts, and does not suggest that the Sixth Circuit overlooked some egregious constitutional error. Petitioner's federal claims have been fully aired and examined in both state and federal court, and every claim has been rejected by every judge who has looked at them. There is no issue here that warrants this Court's review.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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